

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

with affidavits of mailing

77-4180

To be argued by
RICHARD J. LEON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-4180

MADHUKANT JINABHAI MEHTA,
Petitioner,

—against—

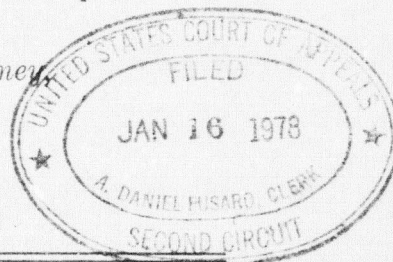
IMMIGRATION and NATURALIZATION SERVICE,
Respondent.

ON PETITION FOR REVIEW FROM THE BOARD OF
IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the Respondent.*

RICHARD J. LEON,
Special Assistant United States Attorney
PATRICK H. BARTH,
*Assistant United States Attorney,
Of Counsel.*



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United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-4180

MADHUKANT JINABHAI MEHTA,
Petitioner,
—against—

IMMIGRATION and NATURALIZATION SERVICE,
Respondent.

BRIEF FOR RESPONDENT

Preliminary Statement

Pursuant to Section 106 of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1105a, Madhukant Jinabhai Mehta ("Mehta") petitions this Court for review of a decision of the Board of Immigration Appeals ("Board") on August 5, 1977 which: (1) denied Mehta's application for adjustment of status under Section 245 of the Act, 8 U.S.C. § 1255 because he failed to qualify for an exemption under 8 C.F.R. § 212.8(b)(4) (1973) as an "investor"; and (2) refused to reopen and reconsider the order of deportation of Immigration Judge Francis J. Lyons on December 14, 1976.

Issues Presented

Whether the Board of Immigration Appeals properly denied Mehta's application for adjustment of status?

Whether the Board of Immigration Appeals decision refusing to reopen Mehta's deportation proceedings constituted an abuse of discretion?

Statement of the Case

On October 14, 1971, Mehta, a 60 year old native and citizen of India, entered the United States at New York, New York as a nonimmigrant visitor for pleasure (AR 197),¹ with permission to remain in the United States until April 13, 1972. He subsequently applied for and was granted an extension of this period until October 13, 1972.

On April 19, 1972 Mehta submitted the necessary documents to the United States Department of Labor (the "Labor Department") for a labor certification as an employment counselor for Joule Technical Corporation (AR 232-33, 238-39). On June 28, 1972 a labor certification was granted to Mehta and based on that he applied to adjust his status from a nonimmigrant visitor to a lawful permanent resident under Section 245 of the Act, 8 U.S.C. § 1255.² While awaiting a hearing on his appli-

¹ References in this brief preceded by the letters "AR" are to the certified administrative record previously filed with this Court.

² Section 245 of the Act, 8 U.S.C. § 1255, permits the Service, in its discretion, to adjust the status of an alien to that of an alien lawfully admitted for permanent residence if, *inter alia*, the alien is eligible to receive an immigrant visa. At the time of this application, Mehta could have been eligible for only two types of visas: (1) a sixth preference visa pursuant to Section 203(a)(6) of the Act, 8 U.S.C. § 1153(a)(6); or (2) a non-preference visa pursuant to Section 203(a)(8) of the Act, 8 U.S.C. § 1153(a)(8). However, it is irrelevant which type of visa was requested for Mehta since a condition precedent to the issuance of either was compliance with the labor certification requirement contained in both sections of the Act. In this regard,

[Footnote continued on following page]

cation, however, Mehta, without the Service's permission, remained in the United States after October 13, 1972.

On May 23, 1973 the Service was notified by the president of the Joule Technical Corporation that the counseling position that had been offered to Mehta by the former manager of the company's New York City office was never approved by the company's corporate headquarters and was being officially withdrawn because that position was not available (AR 237). Because of this withdrawal, Mehta's application to adjust his status was no longer viable.

Consequently, on July 2, 1973 the Service issued an order to show cause and notice of hearing charging Mehta with violating Section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2), by remaining in the country beyond the authorized time he was permitted (AR 197-98). The order to show cause was sent by certified mail to Mehta (AR 198).

On July 17, 1973, merely two weeks after the Service issued its order to show cause, Mehta applied to the Labor Department for a labor certification as a "law clerk" for an attorney in New York City specializing in immigration law, Leon Grossman ("Grossman") (AR 203-06). The labor certification was granted by the Labor Department on September 24, 1973 (AR 202). On October 16, 1973 Grossman filed a petition with the Service to obtain for Mehta the preferential status, under Section 203(a)(6) of the Act, 8 U.S.C. § 1153(a)(6), ("sixth reference peti-

Mehta could not be considered eligible for a visa unless a statement was submitted by his employer to the Secretary of Labor, pursuant to 29 C.F.R. § 60.3(c), providing a description of the job he was doing and certifying that he was needed to do the job.

tion") of an alien "capable of performing specified skilled or unskilled labor, not of a temporary or seasonal nature for which a shortage of employable and willing persons exists in the United States (AR 228-230).

On May 3, 1974 Mehta's deportation hearing was conducted at the Service's New York City office before Immigration Judge Francis J. Lyons (AR 188-192). At the hearing Mehta, through his counsel, admitted receipt of the order to show cause and conceded his deportability under Section 241(a)(2) of the Act (AR 189). Thereafter, he submitted an application to Judge Lyons to adjust his status under Section 245 of the Act, to a lawful permanent resident (AR 199-201). This application was based on his previously granted labor certification as a law clerk and Grossman's pending petition to obtain a sixth preference visa status for Mehta. Judge Lyons accepted the application into evidence, but was compelled to adjourn the hearing for four weeks when preliminary questioning of Mehta revealed that testimony from Grossman would be necessary, before adjudicating the application, to determine the viability of his job offer and the nature of Mehta's responsibility as a law clerk.³

When the hearing reconvened on May 31, 1974, Judge Lyons found, after several questions by the Service's trial attorney, that neither Grossman nor his attorney were adequately prepared to provide the necessary documentary and/or testimonial information regarding Mehta's application (AR 184). Accordingly he adjourned the hearing to August 23, 1974 to afford them additional time to do so.

³ Judge Lyons discovered upon questioning Mehta that he had never worked for Grossman as a law clerk during the 10 month period between the application for the labor certification and the deportation hearing (AR 192). Consequently, Mehta was not only unable to testify as to the duties Grossman would assign him, but also unable to testify as to whether the job offer was still open.

However, when they reconvened on the twenty-third, Judge Lyons again found Grossman's testimony, although substantial in quantity, not complete and consequently adjourned the hearing for the Service to conduct an investigation and Grossman to submit further documentary evidence (AR 174).

Nearly eight months later, on April 22, 1975, Mehta's hearing was reconvened for the fourth time. At the outset, Mehta informed Judge Lyons that Grossman had retired from the practice of law and had thereby withdrawn his job offer which was the basis of Mehta's application for adjustment of status (AR 88). However, he added that rather than abandoning his application he wanted to modify his application and submit to Judge Lyons an application for the investor status exemption under 8 C.F.R. § 212.8(b)(4), which if granted would exempt him from otherwise establishing the labor certification requirement for adjustment of status (AR 88).

In his application Mehta claimed that he had purchased on January 15, 1975 a retail and wholesale store named Geeta International ("Geeta"), specializing in India and Far East spices and handcraft, which he had been operating ever since (AR 241). Judge Lyons permitted Mehta to try to introduce sufficient evidence to show his eligibility for this exemption (AR 89). The questioning of Mehta by his attorney and the Service's trial attorney that ensued thereafter, however, was not dispositive of the issues raised by the application. Therefore, Judge Lyons adjourned the proceedings to afford Mehta another opportunity to introduce documentary evidence to establish his eligibility for this exception (AR 112).

On September 13, 1976, Mehta's proceedings were reconvened (AR 65). At that time his attorney introduced into evidence various documents to prove that Mehta had the requisite experience to conduct this business and that he had made the requisite \$10,000 investment required by

the regulation.⁴ In addition Mehta presented his accountant, Paul Reiner ("Reiner"), as a witness to testify as to the contents of the income statement (AR 274) and both the balance sheets of Geeta for 1975 and at the time of its purchase (AR 272-73), which he had introduced into evidence.⁵ At the close of Reiner's testimony Judge Lyons continued the proceeding to November 10, 1976 in order that Mehta's income tax returns for 1974 and 1975 could be submitted into evidence, as well as any further testimony that might be helpful.

⁴ Mehta relied on three documents to meet the then requirement under 8 C.F.R. § 212.8(b)(4) (1973) that he show "at least 1 year's experience or training qualifying him to engage" in this business enterprise. First, he submitted a certificate of merit dated January 20, 1946 and awarded to Mehta Paper Mills Ltd. (AR 269). Mehta claimed in his testimony (AR 90) that from 1942 to 1955 he had been managing director of the company in India and therefore had adequate business experience and training to conduct his own business. Moreover, he stated in his testimony that he had been the purchaser and buyer from 1955-1957 for the Sayaji Jubilee Cotton and Jute Mills Co. in India. To support this contention he submitted an affidavit (AR 270) and a letter (AR 271) from two men in India who claimed to have known him personally when he worked in that capacity.

⁵ The income statement relating to Geeta for the year 1975 specifically included a statement by Reiner that he did not conduct an "independent verification of assets and liabilities" of Geeta and accordingly was not able to render an "opinion" regarding the company's financial status (AR 274). Moreover, the balance sheets detailing Geeta's financial status at the time of purchase on January 15, 1975, included a statement by Reiner that his preparation was based on information from Mehta and his review of the sales contract and records of payments made in 1975. Finally, the balance sheet detailing Geeta's financial condition at the end of its first year of operation, December 31, 1975, also included the same statement by Reiner on the income statement that this was not an audit. Considering the nature of the information supplied to the accountant by Mehta (*i.e.*, all statements regarding inventory) the evidentiary value of these prepared statements was certainly questionable.

On October 1, 1976, Mehta's attorney sent a letter (AR 63-64) to Judge Lyons enclosing the 1974 and 1975 tax returns (AR 276, 279), as well as an affidavit from Reiner explaining the difference between these tax returns and the previously submitted income statement regarding Mehta's business as of September 13, 1976. In addition, his attorney enclosed photocopies of "cancelled" promissory notes for the purpose of evidencing who loaned money to Mehta for his investment and the fact that Mehta had been repaying them (AR 290-301).⁶

On November 10, 1976, Mehta's hearing was reconvened (AR 59). Judge Lyons acknowledged receipt of the letter and accompanying documents and closed the hearing because, in part, Mehta had no other evidence to submit (AR 6).

A month later, December 14, 1976, Judge Lyons issued a decision denying Mehta's application for adjustment of status, refusing to grant him the discretionary relief of voluntary departure, and ordering him deported to India (AR 50-57). In his opinion Judge Lyons found that even if Mehta had established the requisite minimum capital investment for investor's status, he had failed to demonstrate his eligibility for the investor status exemption (AR 55). Moreover, Judge Lyons found that even if Mehta had established eligibility for investor status, he would have denied his application for adjustment of status as a matter of discretion because the record established that Mehta had entered the United States with the fraud-

⁶ The six promissory notes contained in the record evidenced Mehta's debt to the company Mehta purchased his store from, Maya Boutique, Gift & Indian Spices Inc. ("Maya") and a Arun Tanden. Although two of the notes were endorsed as paid in full (AR 299, 301), the remaining four merely contain a notation that a check was received against the note without specifying the amount received.

Moreover, the record indicates that Mehta's *actual* investment in Geeta was only \$3,600, the remaining amount being loans from various sources (AR 71). In effect, therefore, he

[Footnote continued on following page]

ulent intention of becoming a permanent resident and had engaged in a series of specious and contrived actions to accomplish this objective.⁷ Finally, he refused to grant Mehta's application for voluntary departure (AR 87).

Mehta appealed this decision to the Board on December 27, 1976 (AR 49). On May 31, 1977, Mehta's attorney submitted his brief to the Board (AR 22-30) together with a motion asking the Board to remand the case for reconsideration in light of two financial statements regarding Mehta's company prepared by Reiner subsequent to Judge Lyons' decision (AR 31-42).

On August 15, 1977, the Board issued a decision: (1) upholding Judge Lyons finding of noneligibility; (2) refusing to remand the case for further proceedings; and (3) reversing Judge Lyons' denial of voluntary de-

merely purchased a "liability," and did not, as result, invest the \$10,000 minimum amount required by the regulation.

⁷ The actions Judge Lyons referred to in his decision were, in essence, Mehta's two previous applications for adjustment of status which were withdrawn.

The first application was based on a job offer from Joule Technical Corporation ("Joule") to Mehta for a position as an employment counselor (AR 232-233). Judge Lyons found from the record that offer was made by a manager in the corporation and was never submitted for approval and that the manager had made the offer to Mehta based on the representation of Mehta's son, who had worked for Joule, that his father was coming to the United States and needed a job on a temporary basis (AR 236). Viewing these facts in light of the company's withdrawal of the job offer and representation that no such job, at that salary level, was open and available, there was substantial evidence to support Judge Lyons' conclusion that this application and arrangement were contrived to assist Mehta obtain a visa.

The second application for adjustment was based on the law clerk position offered to Mehta by Grossman. Judge Lyons' interpretation of the facts in the record led him to conclude that the law office supposedly established by Grossman in Elmhurst was a "highly improbable enterprise" (AR 52). This conclusion was based on both the testimony of Grossman and the investigation report of the Service (AR 265-67) submitted into evidence by the Service.

parture (AR 15-18). In its opinion the Board treated the motion for a remand as a motion to reopen and found that because Mehta had failed to establish a *prima facie* case of eligibility for the investor status exemption it could not reopen his deportation proceedings to reconsider these new financial statements.⁸ Additionally, the Board, assuming that Mehta had made the requisite financial invest and had the requisite, experience found, as had Judge Lyons, that Mehta failed to qualify for the investor status exemption because he was performing labor that could be performed by a worker already in the United States, but not expanding job opportunities to offset the adverse impact of his own employment (AR 17). Having found Mehta ineligible for the investor exemption, the Board did not comment on Judge Lyons' further finding that Mehta did not warrant an adjustment of his status as a matter of discretion.

On September 9, 1977 Mehta was notified to voluntarily depart from the United States on or before October 17, 1977 (AR 12). On October 13, 1977 Mehta filed a petition with this Court seeking to set aside the Board's decision. Consequently, Mehta has remained in the United States pursuant to the automatic statutory stay of deportation which accompanies every petition for review filed pursuant to Section 106(a)(3) of the Act, 8 U.S.C. § 1105(a)(3).

Relevant Statutes

Immigration and Nationality Act, § 203, as amended, 8 U.S.C. § 1153:

⁸ These new financial statements (AR 33-40) were prepared by Reiner and constituted the balance sheet and income statement of Geeta for 1976, as well as, the balance sheet and income statement of Geeta for the first quarter of 1977. As with the previously submitted financial statements prepared by Reiner, he did not give an opinion.

With regard to the Board's treatment of Mehta's motion for a remand as a motion to reopen, see note 15 *infra*.

(a) Aliens who are subject to the numerical limitations specified in section 1151(a) of this title shall be allotted visas or their conditional entry authorized, as the case may be, as follows:

* * * * *

(6) Visas shall next be made available, in a number not to exceed 10 per centum of the number specified in section 1151(a) (ii) of this title, to qualified immigrants who are capable of performing specified skilled or unskilled labor, not of a temporary or seasonal nature, for which a shortage of employable and willing persons exists in the United States.

* * * * *

(8) Visas authorized in any fiscal year, less those required for issuance to the classes specified in paragraphs (1) through (6) and less the number of conditional entries and visas made available pursuant to paragraph (7), shall be made available to other qualified immigrants strictly in the chronological order in which they qualify. Waiting lists of applicants shall be maintained in accordance with regulations prescribed by the Secretary of State. No immigrant visa shall be issued to a nonpreference immigrant under this paragraph, or to an immigrant with a preference under paragraph (3) or (6) of this subsection, until the consular officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of section 1182(a) (14) of this title.

* * * * *

Immigration and Nationality Act, § 245, as amended, 8 U.S.C. § 1255(a):

(a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application

for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.

* * * * *

Relevant Regulations

Title 8, Code of Federal Regulations (C.F.R.):

§ 3.2 Reopening or reconsideration.

The Board may on its own motion reopen or reconsider any case in which it has rendered a decision. Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the Commissioner or any other duly authorized officer of the Service, or by the party affected by the decision, shall be only upon written motion to the Board. Motions to reopen in deportations proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. . . .

§ 3.8 Motion to reopen or motion to reconsider.

(a) Form. Motions to reopen and motions to reconsider shall be submitted in triplicate. A request for oral argument, if desired, shall be incorporated in the motion. The Board in its discretion may grant or deny oral argument. Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. Motions to reconsider shall state the reasons upon which the motion is based and shall be supported by such precedent decisions as are pertinent. . . .

§ 242.11 Reopening or reconsideration.

Except as otherwise provided in this section, motion to reopen or reconsider shall be subject to the requirements of § 103.5 of this chapter. The special inquiry officer may upon his own motion, or upon motion of the trial attorney or the respondent, reopen or reconsider any case in which he had made a decision, unless jurisdiction in the case is vested in the Board under Part 3 of this chapter. An order by the special inquiry officer granting a motion to reopen may be made on Form I-328. A motion to reopen will not be granted unless the special inquiry officer is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing. . . .

ARGUMENT

POINT I

The Board of Immigration Appeals properly denied Mehta's application for adjustment of status

As an alien applying to adjust his status to a permanent resident under Section 245 of the Act, 8 U.S.C. § 1255, Mehta had to demonstrate that an immigrant visa was immediately available to him at the time of his application. Because he did not qualify for a preferential immigrant visa under Sections 203(a) (1-7) of the Act, 8 U.S.C. § 1153(a) (1-7), he had to demonstrate that a non-preference immigrant visa under Section 203 (a) (8) of the Act, 8 U.S.C. § 1153(a) (8) was available. To qualify for a non-preference immigrant visa however, he had to either comply with the labor certification requirements under Section 212(a) (14) of the Act, 8 U.S.C.

§ 1182(a) (14), or qualify for the investor status exemption from this requirement under 8 C.F.R. § 212.8(b) (4). Mehta chose the latter, and both Judge Lyons and the Board on appeal found that he did not qualify for that exemption and was therefore not eligible to adjust his status to that of a permanent resident (AR 15-18). An examination of the applicable law and the facts in this case will demonstrate the propriety of the Board's decision.

A. The Investor Status Exemption Under 8 C.F.R. § 212.8(b)(4)

The labor certification requirements under Section 212(a) (14) of the Act, 8 U.S.C. § 1182(a) (14), were originally intended by Congress "to provide strong safeguards for American labor" by protecting it against an "influx of aliens entering the United States for the purpose of performing skilled or unskilled labor where the economy of individual localities is not capable of absorbing them at the time they desire to enter this country". *Matter of Heitland*, 14 I.&N. Dec. 563, 566 (B.I.A. 1974).

In 1965 Congress amended the Act to strengthen the controls even further by requiring an alien seeking the labor certification to establish that: "(A) there are not sufficient workers in the United States who are able, willing, qualified, and available . . ., and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed". See *Matter of Ruangswang*, Interim Decision 2546 (B.I.A. 1976) (see addendum to Respondent's Brief).

In response to Congress' action, the Attorney General, through the Service, promulgated regulations, consistent with Congress' purpose, which provided specific exemptions to these more rigorous labor certification requirements of the Act, in instances where the Service concluded that the admission of a certain type of alien would not adversely

affect the domestic labor market. One of the exemptions was the "investor" status exemption contained in 8 C.F.R. § 212.8(b)(4) (1966).

When the investor exemption was originally promulgated in 1966 it read as follows:

The following persons are not considered to be within the purview of Section 212(a)(14) of the Act and do not require labor certifications: . . .

(4) An alien who will engage in a commercial or agricultural enterprise in which he had invested or is actively in the process of investing a substantial amount of capital.

Because that regulation, however, did not clearly specify what constituted a "commercial or agricultural enterprise" or how much money constituted a "substantial amount of capital", the Board, on a case by case basis, was called upon to construe the meaning of this regulation in light of the congressional purpose underlying its promulgation.

In *Matter of Heitland*, 14 I. & N. Dec. 563, 567 (B.I.A. 1974), the Board, for the first time, set out what the nature of the enterprise must be under this regulation by formulating a test, concerning substantial investments, which was consonant with the congressional policy underlying Section 212(a)(14) of the Act.

The enterprise, according to the Board in *Matter of Heitland*, could not be the product of an "idle" investment which might force the alien "to enter the normal labor market in order to supplement the income from the investment", because that would be inconsistent with the statute's labor certification requirement. Rather, the enterprise had to be such that it would guard against the possibility of the alien competing with American labor for available skilled or unskilled positions and not permit the

alien to "usurp an existing job opportunity". In short, it had to "tend to expand the job market, or otherwise insure that the [alien] will not occupy an existing position readily available to American workers."⁹ *Matter of Heitland*, 14 I. & N. Dec. at 566.

In determining whether the investment creating the enterprise was "substantial" and therefore more than "a mere conduit by which the alien seeks to enter the skilled or unskilled labor market", the Board formulated a test, consistent with the proper nature of the enterprise, requiring that the investment "either . . . tend to expand job opportunities and thus offset any adverse impact which the alien's employment may have on the market for jobs, or . . . be of an amount adequate to insure, with sufficient certainty, that the alien's primary function with respect to the investment and with respect to the economy will not be as a skilled or unskilled laborer." (Id at 567).

The *Matter of Heitland* analysis regarding the nature of the enterprise and the test for determining the substantiality of the investment was specifically upheld by this Circuit on January 27, 1977 in *Heitland v. I.N.S.*, 551 F.2d 495 (2d Cir. 1977). In that opinion, Judge Mansfield, speaking for the majority, characterized the Board's interpretation as reasonable and stated:

[w]hether an investment is "substantial" within the meaning of the regulation depends upon its likelihood of creating new jobs, as distinguished

⁹ In *Matter of Heitland* the Board expressly overruled its earlier decision in *Matter of Finau*, 12 I. & N. Dec. 86 (B.I.A. 1967), because the "approach" to the regulation in *Finau* was "unsatisfactory" when viewed in light of the rationale behind the enactment of Section 212(a)(14) of this Act. *Matter of Heitland supra* at 566-67. This decision by the Board was expressly found by this Court in *Heitland v. I.N.S.*, 551 F.2d 495 (2d Cir. 1977) to be a reasonable interpretation of the regulation which was consonant with the congressional purpose behind Section 212 (a)(14) of the Act.

from merely taking advantage of existing employment opportunities by filling them with persons who perform labor or render services as independent contractors rather than as employees. To permit the latter would be to circumvent the purpose of the regulation, which is to protect American workers from unemployment attributable to an influx of aliens competing for a limited number of jobs". (Citations omitted)

Prior to both the Board's decision in *Matter of Heitland* and this Court's decision thereafter in *Heitland*, the Attorney General, through the Service, amended 8 C.F.R. § 212.8(b) (4), on January 12, 1973, to read:

- (b) Aliens not required to obtain labor certification
- (4) an alien who establishes . . . that he is seeking to enter the United States for the purpose of engaging in a commercial or agricultural enterprise in which he has invested, or is actively in the process of investing, capital totaling at least \$10,000, and who establishes that he has at least 1 year's experience or training qualifying him to engage in such enterprise.

However, since this amendment went into effect subsequent to the alien's application in *Matter of Heitland*, the test established in that case and upheld in *Heitland*, did not address itself to this new regulation. It was not until *Matter of Ruangswang*, Interim Decision 2546 (1976), decided on December 27, 1976, (nearly three years after *Matter of Heitland* and one month prior to *Heitland*) that the Board was presented with the denial of an application for adjustment of status in which the alien had sought investor status under the amended regulation requiring, *inter alia*, a \$10,000 investment.

In *Ruangswang* the Board after reviewing the congressional purpose behind Section 212(a)(14), reaffirmed its position in *Matter of Heitland*, that the investor exemption under 8 C.F.R. § 212.8 had to be implemented and construed in a manner consistent with that legislative purpose. Consequently it concluded that the investment must be of such a nature, that it "tend to guard against the possibility that he alien will compete with American labor for available skilled or unskilled positions". Logically, therefore, the Board concluded that regardless of whether the alien had invested the \$10,000 minimum, he could not be exempt from the labor certificate requirement "if he was likely to displace an American worker or if his or her employment would have an adverse impact on wages or working conditions". As a result of this reasoning, it held that the "criteria" established in *Matter of Heitland*, requiring that the investment either tend to expand job opportunities (and thereby offset any adverse impact which alien's employment may have on the job market) or insure, with sufficient certainty, that the alien's primary function with respect to the investment and with respect to the economy will be as a skilled or unskilled laborer, was equally applicable to the amended regulation which for the first time specified a minimum of \$10,000 as being a substantial investment.¹⁰

¹⁰ Mehta claims in his brief that the Board's interpretation of the investor exemption regulation in *Matter of Heitland* which was upheld by this Court in *Heitland* and applied later in *Matter of Ruangswag* to the amended investor exemption regulation, was violative of the Administrative Procedure Act, 5 U.S.C. § 552(a)(1)(D), because it constituted a new statement of general policy or interpretation of "general applicability formulated and adopted by the agency" and therefore had to be published in the Federal Register. Based on this premise, he contends that this violation resulted in a fundamental denial of administrative due process and that this Court should therefore reconsider its decision in *Heitland*. This argument is, at best, preposterous.

[Footnote continued on following page]

In *Matter of Heitland* the Board expressly overruled its previous "interpretation" of the investor exemption regulation found in *Matter of Finaa*, 12 I. & N. Dec. 86 (B.I.A. 1967). In both cases the Board was performing its quasi-judicial function of adjudicating cases, on a case by case basis. Its decision, and interpretation, in *Matter of Finaa* was certainly no more immutable than its decision in *Matter of Heitland*. Such is the nature of the adjudicatory process.

The Board is a quasi-judicial body independent of the Service, established by the Attorney General under 8 C.F.R. § 3.1, to adjudicate cases brought before it. The Board is invested with the authority to interpret regulations and its interpretation is entitled to considerable weight by the Courts of law reviewing their decisions. See *Woodby v. I.N.S.*, 385 U.S. 276, 286 (1966). With respect to the Service, however, the Attorney General has provided that:

"[e]xcept as they [the decisions] may be notified or overruled by the Board or the Attorney General, decisions by the Board shall be binding on all officers and employees of the Service in the administration of the Act, and selected decisions designated by the Board shall serve as precedents in all issues." 8 C.F.R. § 3.1(g).

The precedential decisions of the Board, such as *Matter of Heitland*, are published by the Service, as interim decisions at first, and are available to both the public and the bar. Mehta's contention that the decision of the Board is, in effect, a statement of policy or interpretation adopted by the agency [the Service] is false. The decision of the Board is made independent of the Service and is binding on the Service. Moreover, his contention in effect, that the Service should be required to publish in the Federal Register every precedential decision of the Board is incredulous.

In *Matter of Heitland* the Board defined, through the use of a test, what the nature of an alien's enterprise (investment) had to be in order for him to qualify for the exemption under 8 C.F.R. § 212.8. In *Heitland* this Court upheld the Board's interpretation and implicitly rejected this argument by Mehta which was advanced therein by Heitland's attorney. In *Matter of Ruangswang*, the Board consistently applied this concept of this enterprise to the amended regulation, requiring the investment of a certain minimum amount of capital and the showing of previous experience or training in the enterprise invested in. In both cases the Board was interpreting, in light of

[Footnote continued on following page]

In addition, the Board in *Matter of Ruangswang* expressly limited the earlier decisions in *Matter of Ko*, 14 I. & N. Dec. 349 (Dep. Assoc. Comm. 1973) and *Matter of Ahmad*, Interim Decision 2316 (B.I.A. 1974), and stated that an investor's employment in his own business would only be permissible under the regulation "in situations in which the investor is not performing labor of a skilled or unskilled nature which might be performed by an American worker, or else in which the investment has a tendency to expand job opportunities." *Matter of Ruangswang* at 11a.¹¹

the Congressional policies underlying Section 212(a)(14) of the Act, the regulation to define the nature of the enterprise the alien's funds had produced. In doing so, the Board was acting pursuant to the quasi-judicial function the Attorney General had empowered it with and did not therefore violate any provision of the Administrative Procedure Act.

¹¹ On September 7, 1976 the Attorney General, through the Service, further amended 8 C.F.R. § 212.8(b)(4) by 41 Fed. Reg. 37565 to read:

(b) *Aliens not required to obtain labor certifications . . .*
 (4) an alien who establishes on Form I-526 that he has invested, or is actively in the process of investing, capital totaling at least \$40,000 in an enterprise in the United States of which he will be a principal manager and that the enterprise will employ a person or persons in the United States of who are United States citizens or aliens lawfully admitted for permanent residence exclusive of the alien, his spouse and children. Effective October 7, 1976.

Accompanying this amendment was the following statement regarding the changes:

[t]he basis and purpose of this regulation is to increase the amount of money to be invested by an alien seeking the investor exemption to a more realistic level considering the economic conditions in this country and to prevent the possibility of fraudulent schemes and insure that the investor exemption does not become a means of circumventing the normal labor certification procedure for skilled and unskilled labor set forth in Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14). The regulation also clarifies the requirement of the in-

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With these decisions in mind we turn to the facts before the Board in the record to demonstrate the propriety of its finding that Mehta had failed to establish his eligibility as an investor under 8 C.F.R. § 212.8 (1973).

B. Mehta's investment, as presented in the record, was not consonant with the policies underlying Section 212(a)(14) of the Act and therefore did not qualify for the investor exemption under 8 C.F.R. § 212.8.

The Board's decision finding Mehta unqualified for the investor exemption was very narrow in scope. It did not determine, but assumed, that Mehta had sufficiently established that he had invested the requisite \$10,000 and sufficiently demonstrated the requisite qualifying experience on training. Instead, the Board, concentrating on the nature of the enterprise presented by Mehta's testimonial and documentary evidence, found him unqualified because the enterprise did not meet the standards established in *Matter of Heitland* and applied thereafter to the 1973 amendment of the regulation in *Matter of Ruangswang*. In short, the Board found that the enterprise neither tended to expand job opportunities (and thereby offset any adverse impact which the alien's employment may have on the job market) nor insured,

vestor exemption regulation that the alien investor have managerial prerogative and responsibilities in the enterprise to be established and not provide only a livelihood for himself and his family in competition with citizens and permanent resident aliens having similar investments in like enterprises in this country.

Certainly the evolution to the present regulation clearly demonstrates the Attorney General's response to the Congressional mandate that aliens admitted to permanent residence in this country not enter the domestic labor market, but rather add to the market.

with sufficient certainty, that the alien's primary function with respect to the investment was not as skilled or unskilled laborer. A brief review of the record demonstrates the propriety of that finding.

The record indicates that Mehta purchased for \$10,200 on January 15, 1975 the lease, bulk goods and fixtures of the Maya Boutique, Gifts and Indian Spices, Inc., located in Jamaica, New York (AR 248). This business, already established and ongoing, which he subsequently incorporated under the name Geeta International, apparently specialized in the wholesale and retail of West Indies, Pakistan and Indian spices, gifts and handicrafts (AR 241). At all times this business has been solely operated by Mehta (AR 72). There is nothing in the record to indicate that he has ever employed anyone or that he will be employing anyone in the future.

The testimony of Mehta's accountant, Reiner, together with the tax returns (AR 279-287) balance sheets (AR 272, 273) and income statements (AR 274 and 289) submitted, indicate clearly that Mehta's business is of a marginal nature, demanding his total efforts as a laborer and not productive enough to afford the services of an employee. During 1975, Mehta's store had a total net income, after operating expenses, of only \$5,763.16, which Mehta paid himself for his forty eight hours of work per week (AR 272, 274). Moreover, when Mehta filed his income tax for 1975, his taxable income for 1975 after claiming certain deductions (AR 289) was merely \$3,074.00, an amount barely above the poverty level. Surely, based on this evidence in the record, the Board could not have possibly found that Mehta's business was even capable of expanding job opportunities to offset the adverse impact which his own employment had on the job market.

Moreover, Mehta's argument, specifically rejected by the Board, that if his business continued to expand he

would eventually hire American labor, is clearly contrary to the investor exemption which requires a showing of eligibility at the time the application for adjustment of status is made. To interpret the regulation otherwise would, in effect, be to require speculation by the Service and the Board as to the future prospects of an alien's business: a task Congress undoubtedly never intended to sanction.¹²

In sum, the investment presented in this record to Judge Lyons and the Board was the antithesis of that necessary to qualify for the investor exemption. Consequently, to have granted it would have been to permit Mehta to circumvent the labor certification requirements of the Act. Both Judge Lyons and the Board's decision to the contrary were therefore completely proper and consistent with the congressional purpose behind the regulation as stated by this Court in *Heitland v. I.N.S.*

POINT II

The Board of Immigration Appeals Did Not Abuse Its Discretionary Authority By Refusing to Reopen Mehta's Deportation Proceedings.

A. The reopening of a deportation proceeding is a matter of discretion.

The Immigration and Naturality Act contains no specific provisions for the reopening of a deportation proceeding. The Attorney General, under his broad grant

¹² Mehta also made the argument, which was rejected by the Board, that because he purchases goods from firms which "undoubtedly" employ American workers, his store is indirectly benefiting American labor (AR 25). This argument is not only unsubstantiated by the record, but totally inconsistent with the policy behind Section 214 of the Act.

of authority to administer and enforce the Act,¹³ has promulgated regulations which permit reopening or reconsideration of prior decisions as a matter of discretion provided certain criteria are met. The applicable regulation, 8 C.F.R. § 3.2 provides in pertinent part that motions to reopen or reconsider "shall not be granted unless it appears to the Board that the evidence sought to be offered is material and was not available and could not have been discovered at the prior hearing". Additionally, 8 C.F.R. § 3.8 provides that "motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits and other evidentiary material". See also 8 C.F.R. § 242.22.

Obviously the regulations contemplate that a motion to reopen or reconsider a prior decision shall contain an offer of evidence, and that the evidence offered shall have been hertofore unobtainable, and that the evidence, if accepted would be sufficient to warrant the granting of the relief sought. Accordingly, the Board is required to evaluate any such offer of evidence against the background of the record already compiled in the alien's case. When such evidence, even if accepted as true, would not justify a grant of the ultimate relief sought, it is obvious that no purpose would be served by reopening the proceeding. Therefore, when making his motion to reopen for reconsideration, it was incumbent upon Mehta to offer evidence to show that he was eligible under 8 C.F.R. 212.8(b)(4) (1976) for the investor status exemption.¹⁴

¹³ Section 103(a) of the Act, 8 U.S.C. § 1103(a).

¹⁴ Because Mehta's motion to reopen was made after October 7, 1976, the day the latest amendment to 8 C.F.R. 212.8(b)(4) went into effect (See note 17, *supra*), all documents submitted with his motion pertaining to his investment's operation after October 7, 1976 could only be in support of a motion to reopen so as to consider an application for investor status under this new regulation. Consequently, Mehta's financial information re-

[Footnote continued on following page]

B. The record in this case demonstrates that the Board did not abuse its discretion by refusing to reopen petitioner's deportation proceedings

As discussed previously, the Board refused to reopen Mehta's deportation proceedings for reconsideration because the documents he submitted referring to his business operations before and after October 7, 1976 failed to establish a *prima facie* case for his eligibility for the investor exemption status (AR 18). In this appeal Mehta contends that the Board's decision should be reversed because it constitutes an abuse of discretion.

In reviewing this exercise of discretionary authority the scope of judicial review is extremely narrow. This Court is precluded from substituting its judgment for that of the Board unless the Board's determination is found to be without any rational explanation, to depart inexplicably from established practices, or to rest on an impermissible basis. *Wong Wing Hang v. Immigration and Naturalization Service*, 360 F.2d 715 (2d Cir. 1966); *Ex Parte Orlando*, 131 F.Supp. 485 (S.D.N.Y.) aff'd 222 F.2d 537 (2d Cir.), cert. denied 350 U.S. 862 (1954). A review of the facts contained in Mehta's motion to reopen, in light of this limited standard, demonstrates the propriety of the Board's discretionary decision.

garding the first quarter performance of his business in 1977 could only be considered in determining whether Mehta had established a *prima facie* case of eligibility under the most recent investor exemption regulation which requires a minimum \$40,000 investment and a showing that the business is employing one or more members of the American labor force, exclusive of himself and his family. *Matter of Heidari*, Interim Decision 258 (B.I.A. 1977) (see addendum to Respondent's brief)

1. In the absence of sufficient supporting evidence, the Board's decision refusing to reopen the petitioner's deportation proceedings was proper.

The basis of Mehta's motion to reopen¹⁵ was the financial statements prepared by his accountant regarding the financial condition of Geeta for the year 1976 (AR 34-36) and the first three months of 1977 (AR 38-40).

The balance sheet and income statement prepared from the books and records of Geeta for the period January 1, 1976 to December 31, 1976, indicate that Mehta had a net income of \$8,345.77 for the year 1976: approximately \$2,600 more than he earned the previous year. As in 1975, Mehta once again was the sole employee of Geeta. Surely these documents alone presented no new information which could appreciably change Judge Lyons' previous perception of Mehta's investment. The additional net income Mehta had acquired did not, by itself, either indicate or compel the conclusion that the investment tended to expand job opportunities and thereby offset any adverse impact Mehta's employment had on the job market. In short, this new information did not further establish Mehta's eligibility for the investor status and consequently was properly rejected by the Board as the

¹⁵ When an order of deportation is entered against an alien by an Immigration Judge it is final unless an appeal is taken from that decision to the Board or the case is certified to the Board. 8 C.F.R. § 292.20.

The Attorney General, however, has provided regulations that permit the alien to submit a motion for the discretionary reopening of his proceeding in order that material evidence not previously available may be considered. 8 C.F.R. § 103.5 and § 242.22.

The motion for remand submitted to the Board by the alien sought the consideration of such material and was therefore, in effect, a motion to reopen and treated as such by the Board.

grounds upon which to reopen Mehta's deportation proceedings.

With regard to the balance sheet and financial statement concerning the first quarter of 1977, the Board had to determine whether this evidence made a *prima facie* showing of Mehta's eligibility for the investor exemption regulation as amended in October 1976.¹⁶ Because the amended regulation requires a showing of a minimum \$40,000 capital investment and that the commercial enterprise will employ a person or persons in the United States who are United States citizens or aliens lawfully admitted for permanent residence, the quarterly financial statement and balance sheet were totally inadequate to establish Mehta's eligibility. As with the previous reports prepared by his accountant, these documents merely indicated, in essence, Mehta's net income for the first three months of 1977 as the sole employee of Geeta. Consequently, Mehta was not eligible for the investor exemption under the amended regulation and the Board properly refused to reopen his proceedings for a reconsideration of his rejected application for adjustment of status.

¹⁶ See Note 14, *supra*.

CONCLUSION

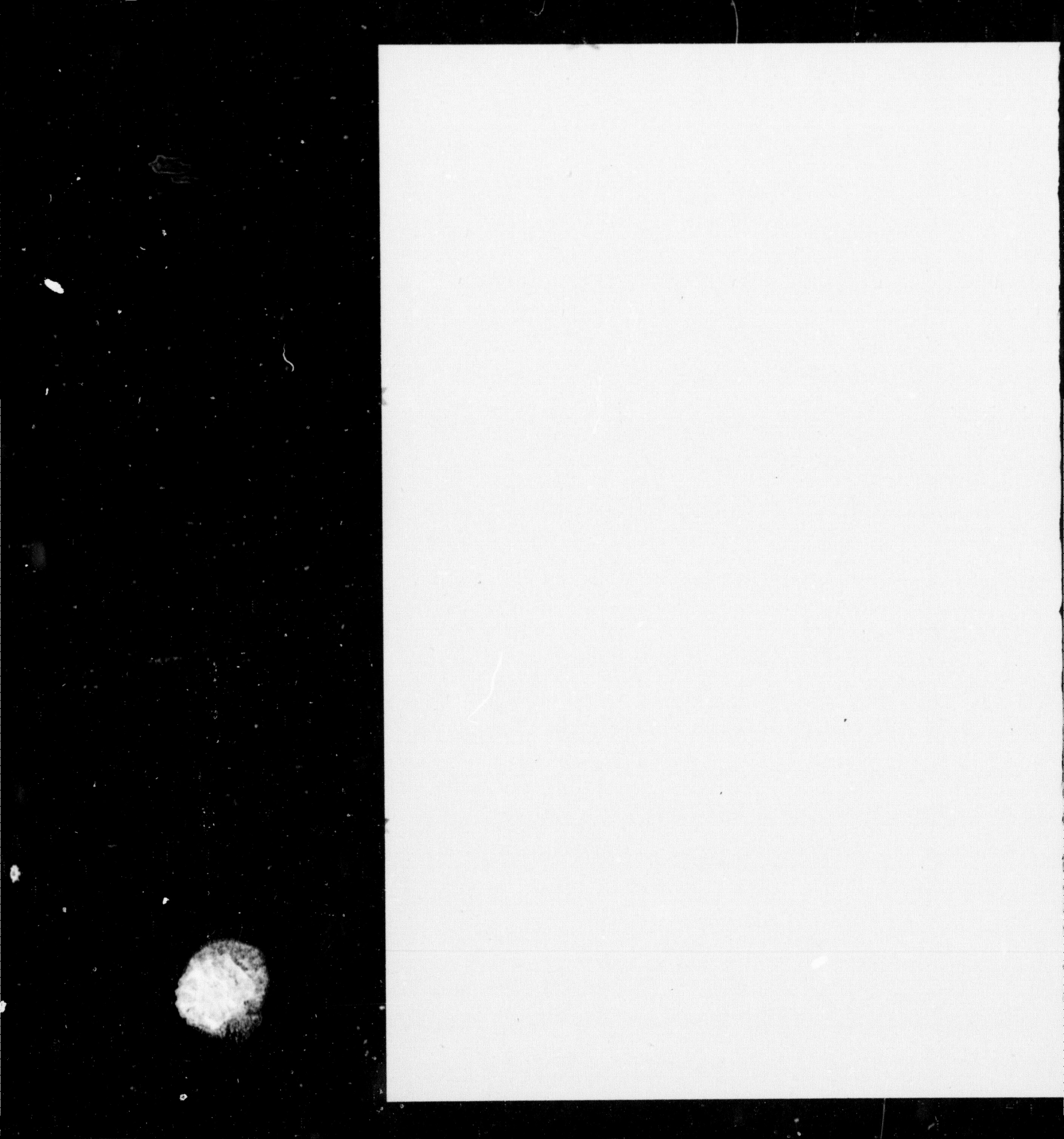
The petition for review should be dismissed.

Respectfully submitted,

Dated: New York, New York
January 13, 1978

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for Respondent.*

RICHARD J. LEON,
Special Assistant United States Attorney,
PATRICK H. BARTH,
*Assistant United States Attorney,
Of Counsel.*



ADDENDUM



Interim Decision #2581

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
Washington, D.C. 20530

May 4, 1977

File: A12 672 733—Los Angeles

In re: EHSANOLLAH *HEIDARI-MOJAZ*
IN DEPORTATION PROCEEDINGS
ON BEHALF OF RESPONDENT:

John L. Hogg, Esquire
Hogg & Frank
523 West Sixth St., Ste. 509
Los Angeles, CA 90014

CHARGE:

Order: Section. 241(a)(2), I&N Act (8 U.S.C.
1251(a)(2))—Nonimmigrant stu-
dent—remained longer than per-
mitted

APPLICATION: Reconsideration and reopening
By: Milhollan, Chairman; Wilson, Maniatis and
Appleman, Board Members

The respondent moves for reconsideration of our decision of December 3, 1976.¹ In our decision of December 3, 1976 denying a motion to reopen the deportation proceedings against the respondent so as to allow him to file for adjustment of status under section 245 of the Immigration and Nationality Act. The present motion will be denied.

¹ This is the fourth time this case has been before us, and the third time since we affirmed the immigration judge's decision dated March 20, 1974 denying the respondent's application for suspension of deportation under section 244(a)(1) of the Immigration and Nationality Act.

We have again reviewed the evidence before us at the time of our decision of December 3, 1976, and we find that for the reasons stated in that decision the evidence then before us did not make a *prima facie* showing that the respondent was eligible for adjustment of status as an investor.

As we mentioned in our decision of December 3, 1976, the regulation exempting investors from the labor certification was amended prospectively effective October 7, 1976. Under the new version of 8 C.F.R. 212.8(b)(4), a prospective immigrant has to show that he has invested or is actively in the process of investing capital totaling at least \$40,000 in an enterprise in the United States of which he will be a principal manager and that that enterprise will employ a person or persons in the United States who are United States citizens or aliens lawfully admitted for permanent residence, exclusive of the alien, his spouse and children.

The respondent is seeking to prove eligibility through operating statements for the months of November 1975 through December 1976, with respect to a business we found unqualified in November 1975. Rather than moving for reconsideration of the application on the basis of evidence in existence at the time the application was filed and considered, the respondent is seeking consideration of his application on the basis of evidence originating *after* the application was first submitted for consideration. To consider that evidence under the original application and under a regulation now superseded would only encourage the respondent and like applicants to prolong their unlawful stay in the United States in the hope of eventually establishing eligibility under the defunct regulation. We are unwilling to allow this circumvention of the duly published regulations.

3a

Accordingly, the respondent is required to meet the standards of the present regulation since the documentation now before us was submitted after the entry in force of the new regulation. The documentation presented is insufficient to make a *prima facie* showing that the respondent meets the requirements set forth there. Therefore, the motion will be denied.

ORDER: The motion is denied.

.....
Chairman

JMB:dwm

MATTER OF RUANGSWANG

In Deportation Proceedings

A-20549199

A-20549108

Decided by Board December 27, 1976

(1) Respondents who are husband and wife have conceded deportability and seek adjustment of status under section 245 of the Immigration and Nationality Act as nonpreference immigrants who are exempt from the labor certification requirement of section 212(a)(14) of the Act as provided in 8 CFR 212.8(b)(4), based on the wife's investment of \$13,000 in a dry cleaning establishment. The husband's eligibility depends on that of his wife.

(2) Respondent wife does all of the work necessary in conducting the dry cleaning business in which she has invested, assisted only by her husband who works as a part time employee. Under these circumstances, and notwithstanding respondent's monetary investment, respondent does not qualify for exemption from the labor certification requirement as an investor because her investment does not expand job opportunities in the United States; respondent's labor with respect to her investment places her in direct competition with United States citizens who are dry cleaning operators; and respondent is actually engaged in full time labor for which it has not been shown that a shortage of able, willing, qualified and available workers exists in the area.

CHARGE:

Order: Act of 1952—Section 241(a)(2) [8 U.S.C. 1251(a)(2)]—Nonimmigrant—remained longer

ON BEHALF OF RESPONDENT:

Bert D. Greenberg, Esquire
8484 Wilshire Blvd., # 730
Beverly Hills, California 90211

BY: Milhollan, Chairman; Wilson, Torrington, Maniatis
and Appleman, Board Members

This is an appeal from the immigration judge's denial of the respondents' applications for adjustment of status. In his decision, which was entered on August 18, 1975, the immigration judge found the respondents deportable and granted them the privilege of voluntary departure.

The respondents, a husband and wife, are both natives and citizens of Thailand. The husband is 31 years of age; the wife is 30 years of age. They were both admitted to the United States on August 14, 1971, the husband as a non-immigrant student, the wife as the spouse of a nonimmigrant student. They were authorized to remain until January 31, 1975, but remained thereafter. They conceded deportability.

The respondents seek adjustment of status as non-preference aliens¹ who are exempt from the provisions of section 212(a)(14) of the Act under 8 C.F.R. 212.8(b) () on the basis of the wife's investment in a dry cleaning establishment. The male respondent's case is dependent upon the female respondent's. (Hereafter, the female respondent will be referred to as the respondent).

¹ Nonpreference numbers are currently available for natives of Thailand, according to the Visa Office Bulletin on Availability of Immigrant Visa Numbers for November 1976.

The immigration judge concluded that the respondent had not established eligibility for investor classification; he further decided that even if she had, he would deny the applications in the exercise of discretion, because the respondent had been employed in violation of their non-immigrant status. The immigration judge considered that this adverse factor was not outweighed by the favorable factor that they are the parents of a United States citizen child. We agree with the conclusion of the Immigration judge regarding eligibility and shall not reach the question regarding discretion.

The provisions of 8 C.F.R. 212.8(b) (4) were amended effective October 7, 1976, but we shall consider this case under the prior version of the regulation, the one which was in effect when the respondent first applied for consideration thereunder. The amendment was accompanied by a statement that Forms I-526 (Request for Determination that Prospective Immigrant is an Investor) properly filed before the effective date of the amendment are to be processed in accordance with the regulation as it existed prior thereto. 41 Fed. Reg. No. 174, p. 37566 (9-7-76). The respondent submitted her Form I-526 on June 17, 1974.

The applicable version of the regulation provides:

The following persons are not considered to be within the purview of section 212(a)(14) of the Act and do not require a labor certification: . . .

(4) an alien who establishes on Form I-526 that he is seeking to enter the United States for the purpose of engaging in a commercial or agricultural enterprise in which he has invested, or is actively in the process of investing, capital totaling at least \$10,000, and who establishes that he has had at least 1 year's experience or training qualifying him to engage in such enterprise.

The respondent testified and submitted evidence that she has invested more than \$13,000 in her dry cleaning business. As evidence of her qualifying experience or training she submitted a translation of a document certifying that she had received a bachelor's degree in accountancy from Chulalongkorn University on April 16, 1969 and a statement from the Siam Motor Company, Ltd, Bangkok that she was employed by them from June 1969 until July 1971 doing budgeting and financial review.

The Service does not contest the amount of the respondent's investment or her qualifications to run the business. She testified that she operates the business alone and that her husband assists her about 28 hours per week. Her net income from the business was about \$7,500 during 1974 (Tr. 8). Her profit or loss statement as of June 30, 1975 for the first six months of 1975 shows \$9,094.31 total sales and a net operating profit of \$6,038.85. She testified that she was making about \$1,000 per month net profit during 1975 (Tr. 8).

At the time that section 212(a)(14) was originally enacted, the drafters of the Immigration and Nationality Act stated that the purpose of the provision was to provide strong safeguards for American labor, to provide American labor protection against an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor where the economy of individual localities is not capable of absorbing them at the time they desire to enter this country. H.R. Rep. No. 1365, 82nd Cong. 2nd Sess. (1952), reprinted in [1952] U.S. Code Cong. & Ad. News 1705.

The 1965 amendment was designed to strengthen the controls even more. S. Rep. No. 748, 89th Cong. 1st Sess. (1965), reprinted in [1965] U.S. Code Cong. & Ad. News 3328, 3333. Section 212(a)(14) requires that each alien seeking to enter the United States for the purpose of performing skilled or unskilled labor to establish that "(A)

there are not sufficient workers in the United States who are able, willing, qualified, and available . . . and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed."

The certification requirement applies to the nonpreference category, which is the category applicable to the respondent. The desired effect of the requirement is to exclude an intending immigrant who would be likely to displace a qualified American worker or whose employment would have an adverse impact on the wages and working conditions of workers similarly employed in the United States.

The implementing regulation on which the respondent relies, 8 C.F.R. 212.8, was designed to be consonant with the language and purposes of the Act; accordingly, we must construe the regulation in a manner which would be consistent therewith. It was not designed to provide a method of circumventing the normal labor certification requirements, *Matter of Lee*, Interim Decision 2415 (BIA 1975), *Matter of Ahmad*, Interim Decision 2316 (BIA 1974). The nature of the investment must be such that it tends to guard against the possibility that the alien will compete with American labor for available skilled or unskilled positions, *Matter of Takayanagi*, Interim Decision 2472 (BIA 1976), *Matter of Heitland*, 14 I&N Dec. 563 (BIA 1974).

Thus, notwithstanding that an alien has invested \$10,000 or more in a commercial or agricultural enterprise and has the requisite experience to engage in that enterprise, the alien is not exempt from the labor certification requirement if he or she is likely to displace an American worker or if his or her employment would have an adverse impact on wages or working conditions. See *Matter of Chiang*, Interim Decision 2488 (BIA 1975),

Matter of Takayanagi, supra, *Matter of Lee*, supra, *Matter of Yang*, Interim Decision 2335 (R.C. 1974). The nature of the respondent's investment is such that her employment in the business appears likely to displace an American worker.

The respondent testified that she does all the work connected with her dry cleaning business (Tr. 9). She tags, wets, and pre-spots the clothes, and puts them in the machines; when the clothes are dry, she removes them from the machines, presses them if necessary, and hangs them up. She does the counterwork: receiving orders and payments, and delivering the finished work to the customers. The business is open from 9:00 a.m. to 6.00 p.m. on weekdays, and from 9:00 a.m. to 5:00 p.m. on Saturdays. The only assistance that she has is that of her husband. In order to become a licensed dry cleaner operator, she took a course at a dry cleaning institute. Her certificate of training is in the record.

In a previous case which dealt with an owner operated one person business, *Matter of Heitland*, supra, we observed that the alien's position essentially involved skilled or unskilled labor, in that his employment (delivery service driver) did not differ significantly from other taxi or delivery jobs. The respondent's employment as a dry cleaning operator is not unlike that of dry cleaning operators who work for others. No allegation is made that there is a shortage of such workers.

In *Heitland*, supra, we developed a "test concerning substantial investments":

"The investment either must tend to expand job opportunities and thus offset any adverse impact which the alien's employment may have on the market for jobs, or must be of an amount adequate to insure, with sufficient certainty, that the alien's primary function with respect to the investment

and with respect to the economy will not be as a skilled or unskilled laborer."

That case was decided pursuant to language in a former regulation which exempted aliens who were investing a "substantial amount of capital" from the labor certification requirement. We consider the criteria applicable as well to the regulation before us in this case (which specified that the investment must be of at least \$10,000).

To qualify for investor status, the nature of the investment must be such that the investor is spending his energies in the management of the investment, rather than in performing labor which can be performed by a worker already in the United States, unless the business expands job opportunities thereby offsetting any adverse impact on the alien's own employment.

The respondent's investment does not tend to expand job opportunities. In fact, it has done the opposite, for under the prior owner, there was a job opportunity for an American worker (which the respondent illegally filled), which was eliminated when the respondent purchased the business and commenced doing all the work herself.

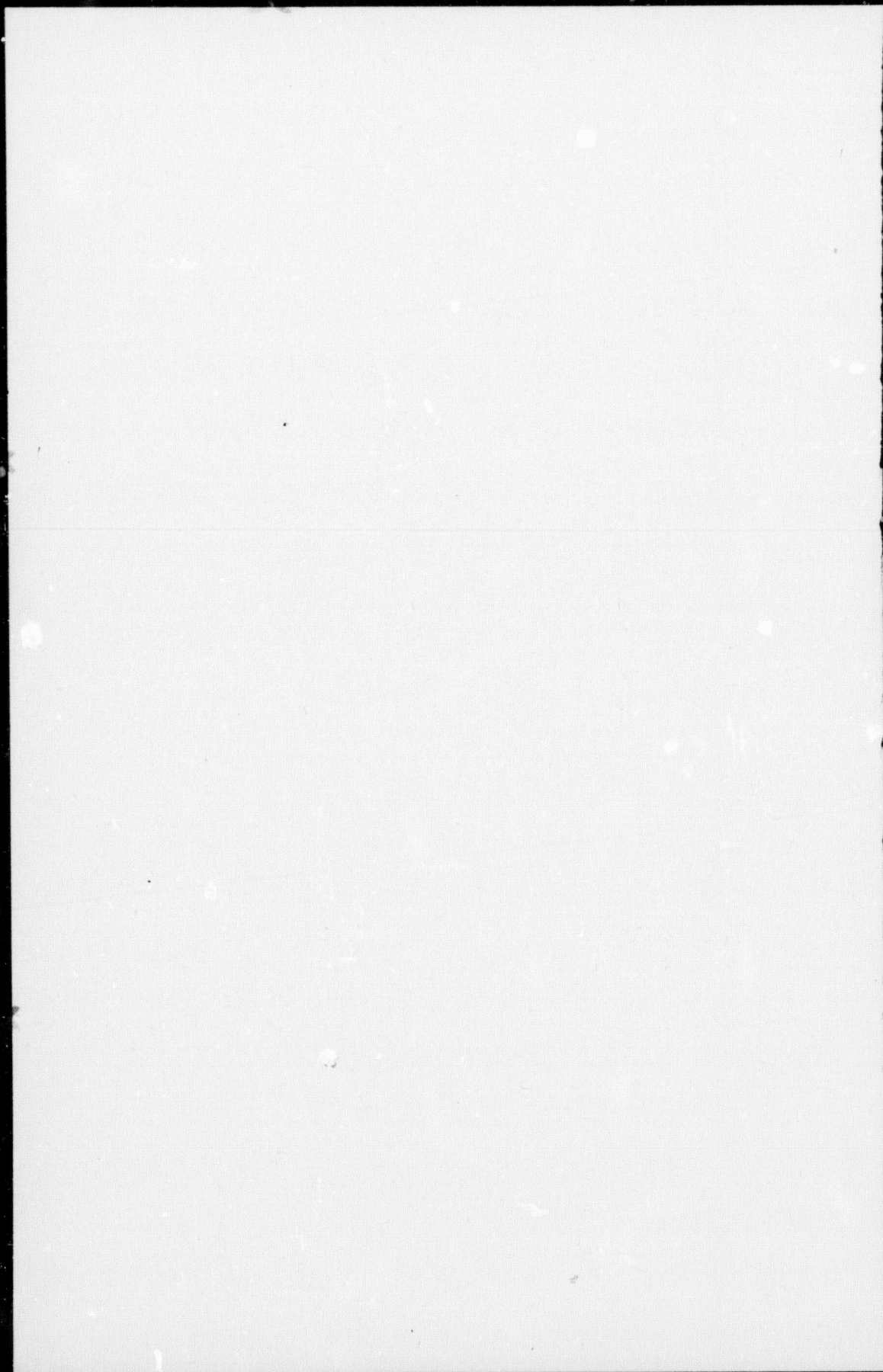
Furthermore, the nature of the respondent's labors in regard to her investment put her in direct competition with United States citizens who are dry cleaning operators. She does not fit the concept of an investor. She is actually engaged in full time labor for which it has not been shown that there is a shortage of workers in the area who are able, willing, qualified and available. The respondent's labor is not merely incidental to her business, but is her primary function; it consumes most of her time. Furthermore, she is not making a true profit from her investment, for what she labels as "net profit" is actually payment for her own labor.

We are aware of language in prior cases that an investor's employment in his own business is not the "job competition" which the Congress wishes to protect against, *Matter of Ko*, Interim Decision 14 I&N Dec. 349 (Dep. Assoc. Commr. 1973) and that a bona fide investor may properly be able to engage in activities of a skilled or unskilled nature, *Matter of Ahmad*, *supra*. We would limit those statements to situations in which the investor is not performing labor of a skilled or unskilled nature which might be performed by an American worker, or else in which the investment has a tendency to expand job opportunities.

Having resolved the case on the basis of eligibility, it is not necessary for us to address the question of whether the respondents would merit the relief of adjustment of status in the exercise of discretion if they were eligible for it.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order, the respondents are permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the District Director; and in the event of failure so to depart, the respondents shall be deported as provided in the immigration judge's order.



AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Richard J. Leon being duly sworn,
deposes and says that he is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
two copies
he served ~~a copy~~ of the
within Brief for Respondent
16th day of January 1978

by placing the same in a properly postpaid franked envelope addressed:

Edwin R. Rubin
Public Ledger Building
6th and Chestnuts Streets
Philadelphia, Pennsylvania 19106

And deponent further says he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

Richard J. Leon

16th day of January, 19 78

Pauline P. Proa

PAULINE P. TROIA
Notary Public, State of New York
No. 31-4632381
Qualified in New York County
Commission Expires March 30, 1978

